to the office of such body or to their clerk, and, if sent by post, **shall be deemed** to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post.
(Emphasis added).

Viscount Reading CJ at page 838 said:

A notice prepaid and addressed as directed by s. 65 if sent through the post 'shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post'. That provision applies to a case where in fact the notice has not been received, otherwise it has no meaning. The intention is to treat as a fact something which has not been established as a fact - even something which can be shown not to be a fact. The section continues: 'and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post.' In my view, when those conditions have been performed it must be taken as concluded that the notice has been served and received ...

Although the words "shall be deemed" in the above case was considered in the context of the statutory provisions, in our view, we can draw an analogy from this case that, in the present appeal, it is sufficient to prove the notice of demand by sending it through the post in an envelope addressed to the last known place of address of the defendant, and once this is established the deeming provision would apply as in the case cited above.

For reasons stated above, in our judgment, on the true construction of cl. 17 of the guarantee, the notice of demand sent by AR registered post and acknowledged receipt for service by the postal authority on 9 March 1988 was effectively served on the respondent on the following day, despite the non-return of the retour card by virtue of the deeming provision therein. In the result, the appellant had established a cause of action against the respondent. Accordingly, we allow this appeal, and with the cansent of the parties, we make no order as to costs. The deposit will, however, be refunded to the appellant.

**EIKOBINA (M) SDN. BHD.**

**v.**

**MENSA MERCANTILE (FAR EAST) PTE. LTD.**

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HARUN BIN MAHMUD HASHIM SCJ,
DATO' PEH SWEE CHIN SCJ,
DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJ
[CIVIL APPEAL NO. 03-25 OF 1992]
4 FEBRUARY 1994

***CONTRACT: Assessment of damages - Assessment valued at date of breach or date of trial - Loss of profit - Remoteness of damages - Whether goods readily available in market.***

The appellant sued the respondent for failure to deliver 24 units of heavy construction equipment. The trial Judge discretionally declined to grant specific performance, but instead, awarded damages for breach of contract and costs to the respondent, dismissing at the same time the appellant's counterclaim. An appeal against the learned Judge's decision to the Supreme Court was dismissed and ordered (a) damages to be assessed and (b) for damages "on loss of agency rights" over other units of equipment.

The learned Registrar assessed damages as follows:

(i) Loss of profit at RM1,766,429
(ii) Loss of sale commission at RM150,000 (in respect of loss of agency rights)
(iii) "Loss of opportunity" at RM456,000

On appeal to the learned trial Judge, the damages aforesaid were confirmed except that loss of commission was reduced from RM150,000 to RM120,000. The appellants appealed against the above award of damages as assessed. However loss of sale commission was abandoned.

**Held:**

**[1]** In the instant appeal, the normal circumstances were there, *viz.* and especially that goods similar to the goods in question were readily available at the market at the time of breach, that is, at the time when the goods in question ought to have been delivered or, if no time was fixed, then at the time of refusal to deliver the goods in question. The normal measure of damages ought to apply, that is, damages

ought to have been assessed as on the date of breach, that is, 27 July 1987. Thus the assessment of damages for loss of profit as on the date of trial or on any date other than the date of breach cannot stand in the circumstances of the instant case.

**[2]** In this case there was an available market for the goods similar to the goods in question, a loss of profit as claimed is not a loss resulting from the first rule in *Hadley v. Baxendale,* that is, a loss that follows in the usual course of things.

**[3]** The matter of sub-sales was not communicated to the vendor at the time of contract and this is beyond dispute from the evidence for the sub-sales were in fact transacted after the date of contract between the parties herein but before delivery. Thus the specific loss of profit on 15 units of the goods in question sold before delivery and after contract could not be claimed as it was too remote by virtue of both rules in *Hadley v. Baxendale.* The specific loss of profit for the remaining unsold 9 units of the goods in question could not be claimed for same reason, specifically because of the first rule in *Hadley v. Baxendale.*

*[Appeal allowed].*

**[Bahasa Malaysia** Translation of Headnote]

***KONTRAK: Taksiran gantirugi - Taksiran dinilaikan pada tarikh kemungkiran atau tarikh perbicaraan - Kehilangan keuntungan - Keterpencilan gantirugi - Sama ada barangan tersedia ada dalam pasaran.***

Perayu menyaman responden atas kegagalan untuk menghantarserah 24 unit alat kelengkapan binaan berat. Hakim perbicaraan atas budibicara beliau enggan memberikan perlaksanaan spesifik, tetapi sebaliknya, mengawardkan gantirugi bagi kemungkiran kontrak dan kos kepada responden, dan pada waktu yang sama menolak tuntutan balas perayu. Suatu rayuan ke Mahkamah Agung terhadap keputusan hakim yang bijaksana tersebut telah ditolak dan diperintahkan (a) gantirugi ditaksirkan dan (b) bagi gantirugi "atas kehilangan hak-hak agensi" terhadap lain-lain unit alat kelengkapan.

Pendaftar telah menaksirkan gantirugi seperti berikut:

(i) Kehilangan keuntungan berjumlah RM1,766,429

(ii) Kehilangan komisen jualan berjumlah RM150,000 (berhubung dengan kehilangan hak-hak agensi)

(iii) "Kehilangan peluang" berjumlah RM456,000.

Atas rayuan kepada hakim perbicaraan, gantirugi yang tersebut di atas telah disahkan kecuali bahawa kehilangan komisen telah dikurangkan dari RM150,000 kepada RM120,000. Perayu membuat rayuan terhadap award ganti rugi seperti yang ditaksirkan di atas. Walau bagaimanapun kehilangan komisen jualan telah ditinggalkan.

**Diputuskan:**

**[1]** Dalam rayuan ini, keadaan-keadaan yang biasa wujud di dalamnya, iaitu dan terutamanya bahawa barangan yang serupa dengan barangan yang dipersoalkan telah tersedia ada di pasaran pada waktu kemungkiran tersebut iaitu pada waktu barangan yang dipersoalkan sepatutnya dihantarserah atau, jika tiada sebarang masa yang ditetapkan, maka pada waktu keengganan untuk menghantarserah barangan yang dipersoalkan itu. Ukuran biasa mengenai gantirugi haruslah terpakai iaitu gantirugi patut ditaksirkan sebagaimana pada tarikh kemungkiran, iaitu 27 Julai 1987. Maka, taksiran ganti rugi bagi kehilangan keuntungan sebagaimana pada tarikh perbicaraan atau mana-mana tarikh lain selain dari tarikh kemungkiran tidak boleh diterima dalam keadaan kes ini.

**[2]** Dalam kes ini terdapat pasaran yang tersedia ada bagi barangan yang serupa dengan barangan yang dipersoalkan, kehilangan keuntungan sebagaimana yang didakwa bukanlah kehilangan akibat daripada peraturan pertama dalam *Hadley lwn. Baxendale* iaitu kehilangan yang berlaku dalam urusan biasa sesuatu perkara.

**[3]** Perkara sub-jualan tidak diberitahu kepada penjual pada waktu kontrak dan ini adalah di luar pertikaian bukti kerana sub-jualan sebenarnya dijalankan selepas tarikh kontrak di antara pihak-phak dalam tindakan ini tetapi sebelum dihantarserah. Maka, kehilangan khusus akan keuntungan ke atas 15 unit barangan yang dipersoalkan tersebut sebelum dihantarserah dan selepas kontrak tidak boleh dituntut memandangkan ia adalah terlalu terpencil mengikut kedua-dua peraturan dalam *Hadley lwn. Baxendale.* Kehilangan khusus akan keuntungan bagi baki 9 unit

barangan yang dipersoalkan yang tidak dijual tidak boleh dituntut atas sebab yang sama, terutamanya kerana peraturan pertama dalam *Hadley lwn. Baxendale.*

*[Rayuan dibenarkan].*

**Cases referred to:**
*Leesbosch Dredger v. Edison, SS [1933] AC 449* ***(cit)***
*Hadley v. Baxendale [1854] 9 Exch 341* ***(foll)***
*Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 KB 528* ***(foll)***
*Lee Heng & Co. v. Melchers [1969] MLJ 47* ***(cit)***
*Balsing Ltd. v. Joo Seng & Co. [1972] 2 MLJ 43* ***(not foll)***
*Popular Industries Ltd. v. Eastern Garments Manufacturing Sdn. Bhd. [1989] 3 MLJ 360* ***(not foll)***
*Johnson v. Agnew [1979] 1 All ER 883* ***(dist)***
*Thol v. Henderson [1882] 8 QBD 45* ***(cit)***
*Williams v. Reynolds [1865] 6 B & S 495* ***(cit)***
*Kwei Teck Chao v. British Traders [1954] 2 QB 459* ***(cit)***
*Hall v. Pim [1928] All ER 763* ***(cit)***

**Legislation referred to:**
Sale of Goods Act 1957, ss. 57, 61(1), (2)(a), (b)
Sale of Goods Act 1893, ss. 51(1), (2), (3) & 54 (UK)

*For the appellant - M. Nagarajah (S.C. Lim with him); M/s. Shook Lin & Bok*
*For the respondent - Wong Kim Fatt; M/s. Gulam & Wong*

**JUDGMENT**

**Peh Swee Chin SCJ:**
This is an appeal against an assessment of damages in respect of a vendor who failed to deliver goods to the buyer. An acquaintance with a brief history and material facts leading to this appeal will be essential.

The appellant, (hereafter the "said vendor"), was sued by the respondent, (hereafter the "said buyer"), for failure to deliver 24 units of heavy construction equipment such as "truck cranes", "pile drivers" etc. (hereafter the goods in question wherever it is appropriate) for specific performance of agreement to sell and deliver the goods in question, general damages for breach of contract and for damages, specifically, for loss of agency to sell for the said vendor, other units of similar equipment left at the said vendor's "yard" in Kapar, Port Klang. The claim was disputed by the said vendor who counter-claimed also for work done and materials supplied. The action was tried and the learned Judge found against the said vendor. The learned Judge discretionally declined however, to grant specific performance, but instead, awarded damages for breach of contract and costs to the said buyer, dismissing at the same time the counter-claim of the said vendor, with costs.

From the learned Judge's decision, an appeal was lodged against it to the Supreme Court which dismissed the appeal and confirmed the decision of the learned Judge, upholding the learned trial Judge's order for the said vendor to pay the said buyer,

(a) general damages for breach of contract to be assessed and
(b) for damages "on the loss of agency rights" over the other units of equipment at Kapar.

The damages fell to be assessed by a Registrar of the High Court.

In the event that has turned out, the learned Registrar assessed the damages as follows:

(1) Loss of profit at RM1,766,429.
(2) Loss of sale commission at RM150,000 (in respect of loss of agency rights).
(3) "Loss of opportunity" at RM456,000.

On appeal by the said vendor before the learned trial Judge, the damages aforesaid were confirmed except that the loss of sale commission was reduced from RM150,000 to RM120,000.

On further appeal by the said vendor before us against the award of all damages as assessed, the part of the appeal as related to loss of sale commission was abandoned, while the appeal against the other 2 heads as stated above, was vigorously pursued.

On the award for the loss of profit, for the purpose of this judgment, it will not be necessary to set out the details of the evidence which pre-occupied a great deal of time of the learned Registrar apart from saying, that out of the goods in question and agreed to be sold, namely 24 units of the equipment, the said buyer had resold, after agreement of sale and purchase but before delivery of the same to the said buyer, 15 of them to other sub-buyers leaving 9 units remaining unsold. The loss of profit was arrived at RM1,766,40 by deducting the original purchase price agreed by both parties from a combined figure of proceeds of sub-sales of 15 units sold by the said buyer before delivery and the total value of the unsold 9 units as given by PW1 the said buyer's chief executive officer in his evidence in March 1990 before the learned Registrar as the value or price (as in March

1990) at which he could have sold and realized. The value or price he gave was higher than the fair market value fixed by an appraiser who was called by the said buyer itself as a witness, on the remaining unsold 9 units as at 1 February 1989, a date adopted by the appraiser at the request of the said buyer. The appraiser of the said buyer in his report gave the fair market value at RM1,509,000 as the value as at 1 February 1989, a figure lower than RM1,700,000 claimed by the said buyer's chief executive officer in evidence.

It will be pertinent to refer to such evidence or findings of the learned Judge who tried the main case in so far as they are relevant to the instant appeal before us. The learned Judge found that the date of completion of the contract between the parties was 27 July 1987 and that the said vendor was in breach on 27 July 1987 when payment tendered by the said buyer was not accepted by the said vendor; in other words, failure or refusal by the said vendor to deliver the goods in question on 27 July 1987. The learned Judge further declined to grant specific performance to the said buyer who obtained judgment in its favour, for the learned Judge found to the effect, *inter alia*, that the said buyer had failed to show that machines of the same kind as the goods in question were not easily available in the market and the said buyer's chief executive officer himself testified that it was possible to buy such machines in large quantities in the market. After considering other evidence the learned Judge found, to quote:

> Since such goods can be located in the market or in bulk either singly or in bulk ... I consider that damages is an adequate remedy for the defendant,

That is, instead of granting specific performance.

As regards other evidence having some bearing on this claim for loss of profit, the date of the contract or the "memorandum" as referred to by the parties hereto was 6 May 1987. Of the 24 units of the goods in question, 15 units were sold on various dates beginning from 20 May 1987 to 20 July 1987 to some sub-buyers from the said buyer, a period after the date of the contract and before the said completion date. Except that in cross-examination it emerged that the said buyer bought and sold similar machines or goods, there is nothing from the printed evidence recorded before both the learned Judge and the learned Registrar to show that the said vendor was put on notice before or at the time of contract, that these machines would be sold at the particular prices at which they were later sold, and, or to be sold to particular persons. Such evidence, by its very nature could not be possibly available as the sub-sales were transacted by the said buyer after the date of contract and before the anticipated delivery.

As regards the damages for loss of opportunity at RM456,268, the evidence from the said buyer's chief executive officer was quite brief. The gist of such evidence is as follows. He said before the said buyer became acquainted with the said vendor, the said buyer and one Seng Choon Construction Pte. Ltd., (hereafter Seng Choon) had a "joint venture agreement" on a 50:50 basis on profit in buying and selling heavy equipment, with the said buyer being in charge of buying and selling and Seng Choon being responsible for financing. On a date in March 1987, around 9 March 1987, the joint-venture group bought and sold heavy equipment, making a profit, 50% of which went to the said buyer as its share of profits amounting to RM150,943. The 2nd sale transacted by the joint-venture group was with a named party, this time, *viz.* Kumagai Gumi Co. Ltd. of Japan and the said buyer's share of profit was RM293,250. The 3rd business transaction was with the said vendor herein, who breached the contract and as a result, the said buyer's business associates and customers lost confidence in the said buyer. The next time, Seng Choon went it alone to buy directly from another seller called Sem Wah Corp. and the said buyer's role this time was reduced to that of "a witness" and received Singapore RM83,269 representing a mere 10% of the total profit. The said buyer said that it suffered a loss of 40% profit, i.e. RM456,268 in Malaysian currency.

Again from the evidence before the learned Registrar and the evidence before the learned Judge in the main trial, there is not an iota of evidence to show that the vendor was put on notice before or at the time of contract, of this joint-venture with Seng Choon. Being put on notice means at least and includes a situation where the said vendor can be said to have any actual knowledge of such joint-venture, such knowledge having been conveyed to the said vendor with a sufficient degree of deliberateness in giving to the said vendor, at least a very clear hint that there was a prospect of such loss that could be caused to the said buyer for which

compensation would be payable by the said vendor in case of default by the said vendor.

Perhaps it was due to an undue and in fact, the only emphasis on the part of the said buyer before the learned Registrar of a submission similar to the usual formulation that a plaintiff is to be put in the same position as far as money can do as he would have been in had the breach not been committed that the result appears to be these rather astronomical figures that were awarded by the learned Registrar approaching the proportion of those ludicrous American awards one reads about so often in the newspapers. The learned Registrar has erred on a vital point, in that he has totally failed to apply his mind to the question of the remoteness of damage, an error which has been by no means at all rare on which we will express our view a bit more elaborately.

After liability on a contract is established and when it comes to assessment of damages, two questions are always involved. The first is that no compensation can be awarded for damage that is too remote and the second is that in assessing damage that is not too remote, the correct measure of damages must be adopted i.e. the correct and usual principles of quantifying the monetary compensation must be employed.

The Courts have long recognized that a contract breaker could not be liable for all consequences which flow naturally from a breach of contract and that they must draw a line somewhere, otherwise the consequences would be, *inter alia*, ruinous to the contract breaker. Thus, certain of such ensuing consequences would be regarded as too remote to be claimable, "not perhaps on ground of pure logic but simply for practical reasons", to quote a dictum of Lord Wright in *Leesbosch Dredger v. Edison S.S.* [1933] AC 449 at 460 made in similar vein.

The meaning of remoteness of damage was finally settled in the landmark, *Hadley v. Baxendale* [1854] 9 Exch. 341 as follows:

> When two parties have made a contract which one of them has broken, the damage which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably considered either arising naturally i.e. according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it ...

There are two distinct rules in the above passage. The above passage is followed in fact by another passage in the same paragraph of the case report, which is reproduced below for a better understanding of the above passage:

> Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.

The meaning was further explained extremely well by Asquith LJ in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 KB 528.

According to Asquith LJ, the loss recoverable ought to be reasonably forseeable by the contract breaker. Whether the contract breaker can reasonably forsee such loss depends on the knowledge possessed by him. There are 2 kinds of knowledge, first, the imputed knowledge, i.e. that as a reasonable person, he is taken to know the sort of loss resulting from the breach in the usual course of things, and this is the first rule in *Hadley v. Baxendale*. There is another type of knowledge which is actual knowledge (instead of the imputed knowledge mentioned earlier), and the contract-breaker has such actual knowledge of special circumstances outside the usual course of things that a breach in these special circumstances would be liable to cause more or additional loss which can be recovered in place of the ordinary loss; this much for the remoteness of damage first.

Next, what is the normal measure of damages in the instant case in respect of sale of the goods in question between the said vendor and the said buyer?

The relevant sections in our Sale of Goods Act 1957 (Act 382) are s. 57 and s. 61. They are set out below:

> Section 57 Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.
>
> Section 61(1) Nothing in this Ordinance shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.
>
> (2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price -
>
> (a) to the seller in a suit by him for the amount of the price - from the date of the tender of the goods or from the date on which the price was payable;
> (b) to the buyer in a suit by him for the refund of the price in a case of breach of the contract on the part of the seller - from the date on which the payment was made.

Apparently almost corresponding sections appear in Britain's Sale of Goods Act 1893, s. 51 and s. 54 which are set out as follows:

> Section 51 Damages for non-delivery
>
> (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's, breach contract.
> (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of refusal to deliver.
>
> Section 54 Interest and special damages
>
> Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case whereby by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

It has been often correctly said that s. 51(2) and (3) of the English Act are a mere enactment of the first rule in *Hadley v. Baxendale* and s. 54, of the second rule.

In our s. 57, we do not have Britain's s. 51 (2) and (3) but our s. 61 is the more detailed corresponding section of Britain's s. 54. Therefore English common law as embodied in the said s. 51(2) and (3), applies and in this connection, please see a similar observation by the Court of Appeal in *Lee Heng & Co. v. Melchers* [1969] MLJ 47 in dealing there with another section i.e. s. 59 of our then Sale of Goods Ordinance 1957, in connection with the application of English common law.

Having regard to foregoing paragraphs, the normal measure of damages from the case law is as stated in s. 51(3) of the English Act, as set above, basically the difference between contract price and market price at the time of the breach where there is an available market for the goods in question.

It is pertinent to point out straightaway that the market price in the instant case, would be, according to the normal measure of damages, the market price or current price of the goods in question as at 22 July 1987 (date of breach as found by the learned Judge at the main trial) when the said vendor ought to have delivered the goods in question.

The said buyer submitted otherwise however that the market price should be based, not on the date of the breach, and the learned Registrar appears to have totally agreed with such submission. Thus 15 units of the goods in question had their market value assessed by the learned Registrar as at the date of trial in March 1990 and also at the date of 1 February 1984, which the appraiser, called by the said buyer to Court to testify, adopted as instructed by the said buyer.

The Court may at this stage just as well deal with such submission described above which the lower Court found acceptable. After consideration, we would however have to reject this submission for the following reasons.

This buyer's submission about the basis of time for evaluating market price not being the time

of breach, was said to be first supported by *Balsing Ltd. v. Joo Seng & Co.* [1972] 2 MLJ 43 and *Popular Industries Ltd. v. Eastern Garments Manufacturing Sdn. Bhd.* [1989] 3 MLJ 360. On an examination of these cases, the normal measure of damages was found not applicable totally because there was an abnormal absence of an essential element for the normal measure of damages to apply, *viz.* the goods concerned respectively in both cases were not available in the market. In the instant case, there was evidence from even the said buyer and also the said vendor which supported the finding of learned Judge at the main trial that goods similar to the goods in question in the instant case were readily available at the market, and we would add, should the said buyer bother to buy them, on failure by the said vendor to deliver them.

This erroneous submission was further said to be supported by the case from the House of Lords in *Johnson v. Agnew* [1979] 1 All ER 883, particularly by an *obiter dictum* of Lord Wilberforce at p. 896 as follows:

> The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognised and embodied in s. 51 of the Sale of Goods Act 1893. But this is not an absolute rule; if to follow it would give rise to injustice, the Court has power to fix such other date as may be appropriate in the circumstances.

*Johnson v. Agnew* is an extraordinary case in which to do justice in a very unusual situation, a normal principle of the common law rule was departed from. The plaintiff there had obtained a decree of specific performance of a contract for the sale of land (not goods) in a case in equity, but the default of the defendant in failing to pay the balance of purchase price after the date of the decree had caused the ultimate impossibility of completion of the contract or the implementation of the decree. The plaintiff there was held entitled by the House of Lords to apply subsequently after such impossibility, and to obtain an order of discharge of decree of specific performance; an order terminating the contract and an order also for damages for breach of contract, to be assessed as at common law, because the plaintiff, who had earlier elected for specific performance, was electing simply for the contract to be continued under the Court's control, according to Lord Wilberforce. When discussing the damages to be assessed, Lord Wilberforce in the *obiter dictum* stated that the normal measure of damages for breach of contract of sale of land in assessing the market value at the date of breach was a principle which had (incidentally) by then been embodied in s. 51 of Sale of Goods Act 1893. The *obiter dictum* of Lord Wilberforce cannot be taken to mean that a normal measure of damages can be departed from at one's whim and fancy in the face of normal circumstances responsive to or attracting the application of such normal measure of damages even though the law is not always strait-jacketed. In our instant appeal, the normal circumstances were there, *viz.* and especially that goods similar to the goods in question were readily available at the market at the time of breach i.e. at the time when the goods in question ought to have been delivered or, if no time was fixed, then at the time of refusal to deliver the goods in question.

Basically this erroneous submission of the said buyer ignored the finding of the learned Judge in regard to the aforesaid normal circumstances so that the normal measure of damages ought to apply, i.e. damages ought to have been assessed as on the date of breach, i.e. 27 July 1987.

Thus the assessment of damages for loss of profit as on the date of trial or on any date other than the date of breach cannot stand in the circumstances of the instant case.

We now revert further to the 2 important questions aforesaid when it comes to assessment of damages.

First, on the question of remoteness, we will have to apply *Hadley v. Baxendale.* In this case there was an available market for the goods similar to the goods in question, a loss of profit as claimed is not a loss resulting from the first rule in *Hadley v. Baxendale* i.e. a loss that follows in the usual course of things, a proposition that is supported by a very strong and discernible trend in the cases as to be beyond argument for us unless any given case is distinguishable on some exceptional ground. Thus, in *Thol v. Henderson* [1882] 8 QBD 45, such loss of profit was not claimable even if a seller knew that the buyer had bought with a general

intention to resell; and in *Williams v. Reynolds* [1865] 6 B & S, 495 when the seller knew the buyer would resell before delivery. In *Kwei Teck Chao v. British Traders* [1954] 2 QB 459, 489-490, the ratio was stressed again that resale profits are not recoverable when there is a market, since normally what is contemplated in the usual course of things on non-delivery is that a plaintiff/buyer will go into the market and buy similar goods to honour his re-sale contracts when there is an available market.

If the first rule of *Hadley v. Baxendale* does not apply, we now examine the circumstances if they could qualify for the second rule; the actual knowledge of special circumstances, *viz.* whether details of such potential loss were made known to the contract-breaker before or at the time of contract so that the contract-breaker can be said to have taken the risk of such loss into the bargain of the contract. For example in *Hall v. Pim* [1928] All ER Rep. 763 in which the contract for the sale, as found by Viscount Haldane, between the parties provided for sub-contracts of re-sale of the same goods and showed that the seller had contracted to put the buyer in a position to fulfill his sub-contracts. Thus, sub-contracts were, in our view, brought to the express notice of the seller at that time of the contract and the sub-contracts were in the contemplation of both parties and therefore damages for loss of profit for sub-contracts were allowed in that case.

Here, the matter of sub-sales was not communicated to the vendor at the time of the contract and this is beyond dispute from the evidence for the sub-sales were in fact transacted after the date of contract between the parties herein but before delivery. Thus the specific loss of profit on 15 units of the goods in question sold before delivery and after contract could not be claimed as it was too remote by virtue of both rules in *Hadley v. Baxendale*. The specific loss of profit for the remaining unsold 9 units of the goods in question could not be claimed for the same reason, specifically because of the first rule in *Hadley v. Baxendale*.

It is regretted that the case of *Hadley v. Baxendale* was not cited by anybody before the learned Registrar and the learned Judge.

The award of loss of profit in the sum of RM1,766,429 made by learned Registrar and upheld by the learned Judge below cannot stand due to the remoteness and has to be set aside.

Having disallowed the loss of profit, we next consider if the said buyer is entitled to any damages for breach of contract other than the loss of profit which we have just rejected. We look at the evidence, bearing in mind the normal measure of damages, i.e. the difference between contract price and market price at the date of the breach i.e. on 27 July 1987, and bearing in mind also the date of 6 May 1987 i.e. the date of contract. DW2 testified that from the period of May 1987 up to in fact December 1987, there was no increase in price for goods similar to the goods in question. DW1 said in fact that for the similar period business in second-hand equipment similar to the goods in question was very bad. Such evidence was not even challenged. The said buyer has thus failed to prove any damage for the non-delivery of the goods in question, apart from proving a breach of contract for such non-delivery.

It will have been noticed, in passing, that the normal measure i.e. the difference between contract price and market price etc. is in fact the first rule in *Hadley v. Baxendale* or in other words, it is applied for assessing compensation for damage which is not excluded by *Hadley v. Baxendale*.

On the award for loss of opportunity, we have set out the gist of evidence in regard thereto, such loss cannot pass the test of remoteness laid down in *Hadley v. Baxendale*, either on the first rule or the second one in question.

The award for loss of opportunity at RM456,268 cannot stand and has to be set aside.

Though the said buyer has failed to prove damage for both loss of profit and loss of business opportunity, it has succeeded in proving loss of sale commission when the challenge against such award was withdrawn before us at the outset of the hearing, and the award for RM120,000 for such loss of sale commission therefore stands. In view of this award, any other separate award by way of nominal damages for the infraction of the legal right i.e. breach of contract for non-delivery of the goods in question would be unnecessary.

We therefore allow the appeal by setting aside the order of the Court below dated 12 March 1992 and substitute therefor an order that the appellant do pay RM120,000 only to the respondent as damages for loss of sale commission, with interest thereon at 8% p.a. from the date of

the original Registrar's order i.e. 24 May 1991 until satisfaction and that the respondent do pay to the appellant costs of this appeal here, but that the costs in the Court below are to be paid by the appellant to the respondent instead.

**M & J FROZEN FOOD SDN. BHD. & ANOR.**

**v.**

**SILAND SDN. BHD. & ANOR.**

SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI HAJI ABDUL HAMID BIN OMAR LP,
TAN SRI DATUK EDGAR JOSEPH JR. SCJ,
DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJ
[CRIMINAL APPEAL NO. 02-149-90]
16 DECEMBER 1993

***LAND LAW: Sale by public auction - When sale is completed - Whether chargors interest abrogated - Variation of order in the absence of chargor - Whether valid - Non compliance of ss. 258 and 261 NLC - Whether fatal.***

The 1st respondent (chargor) was the registered owner of a piece of land (said property). The said property was at all material times charged to the 2nd appellant (chargee). Due to a default on the part of the chargor, the chargee obtained order for sale and auction. The said property was auctioned on 25 January 1987. The purchaser who was the highest bidder at a price of RM196,000 was duly pronounced the purchaser of the property. He paid RM49,000 being 25% deposit of the total purchase price. However the purchaser did not pay balance within 30 days from the date of sale. In view of this default, the chargor entered a private caveat on the property. The caveat was removed on technical grounds.

The purchaser some 4 $^{1}/_{2}$ months after the expiry of the date for payment of the balance sum filed an application for and obtained an order for the completion date to be extended by 14 days from the date of the order. As only the chargee and not the chargor was made a party in the application, the chargor as an aggrieved and interested party applied for leave to intervene and order in terms of the application was granted. The learned Judge also set aside the previous order wherein he had extended time of completion of purchase. Meanwhile the chargor had commenced an auction for a rescission of the contract and forfeiture of the deposit of RM49,000 paid by the purchaser. Despite all the contenious events and circumstances, the learned SAR accepted the balance sum and proceeded to issued the certificate of sale to the purchaser who inturn